Filed 1/4/19 P. v. Guernon CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT MICHAEL GUERNON, Defendant and Appellant.	D074456 (Super. Ct. No. BAF1500360)

APPEAL from a judgment of the Superior Court of Riverside County, Jeffrey J. Prevost, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Robert Michael Guernon of six child sex offenses against two minor victims and of possessing child pornography. (Pen. Code, §§ 288.7, subd. (b), 288, subd. (a), 311.11, subd. (a).)[1] On appeal, he argues the trial court abused its discretion in discharging a juror on the second day of trial. Next he claims the admission of minor A.W.'s forensic interview violated his Sixth Amendment right to confrontation because she gave vague and unresponsive testimony at trial. Finally, he claims he received ineffective assistance of counsel when his attorney did not object to statements made in the prosecution's closing arguments that appeared to dilute its burden of proof. As to the first two claims, we find no error. As to the third, we conclude there was no prejudice from the failure to object to any prosecutorial error under *People v. Centeno* (2014) 60 Cal.4th 659 (*Centeno*). Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Evicted from his home, 45-year-old Guernon moved into the garage of his grandmother's home in San Jacinto. A.W., the four-year-old daughter of Guernon's first cousin, often stayed upstairs in the home.

In February 2015, someone found Guernon's cell phone in a park. The phone contained images of child pornography. Guernon had received the phone from his grandmother, who no longer used it. There were 45 pictures stored on the phone; metadata indicated they were all taken between November 2014 and January 2015. There was one picture of A.W. in a bathtub with her legs spread and genitals exposed, two depicting young girls lying on their stomachs, and two others appearing to depict

1 Further statutory references are to the Penal Code unless otherwise indicated.

prepubescent genitalia. The phone was impounded but no charges were immediately brought.

In late May, Guernon's first cousin T.B. was visiting their grandmother.[2] T.B. was A.W.'s maternal aunt. She called out to A.W., who eventually responded from the garage. Entering the garage, T.B. saw A.W. emerge from Guernon's cordoned area, looking down and not making eye contact. Once inside the house, T.B. took A.W. aside, asking her what happened and whether Guernon had touched her. A.W. admitted he had put his hand down her underwear. T.B. immediately took A.W. and her grandmother for a drive, disclosing that Guernon had abused her as a child and stating that he was now touching A.W.[3] Upon returning home T.B. confronted Guernon, who did not respond and left for a nearby park.

The grandmother called 911. Sheriff's deputies soon encountered A.W.'s stepfather and T.B.'s father assaulting Guernon at the park. Deputies took a statement from T.B., who had arrived on the scene, and then went to the grandmother's home. After Guernon consented to a search of the garage, detectives found cutouts from ad circulars showing young girls in underwear, adult pornography, and an open jar of Vaseline.

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2 At trial, A.W.'s aunts were introduced variously as Jane Doe T.T. or Jane Doe T.B., and Jane Doe K.W. respectively. We use "T.B." and "K.W." throughout this opinion for consistency and intend no disrespect.

3 At trial, T.B. testified pursuant to Evidence Code section 1108 that Guernon repeatedly molested when she was between eight and 10 years old. He masturbated standing over her, touched her vaginal area, brushed his penis against her butt, and took pictures of her genitals.

T.B. took A.W. to the hospital where she underwent a SART exam. A nurse took DNA swabs from A.W. before starting the genital exam. A.W. spontaneously cried out, "[Robbie] put his finger in my cookie box," in reference to her vaginal area. The nurse found abrasions and tenderness on A.W.'s vagina consistent with digital penetration. A criminalist analyzed swabs from A.W. and buccal swabs obtained from Guernon. A.W.'s underwear and vulva had a mixture of two contributors; the foreign material was consistent with Guernon's. There was a 1 in 5.1 million chance the foreign DNA on A.W.'s vulva swab belonged to another Hispanic male, a 1 in 1.2 million chance it belonged to another Caucasian male, and a 1 in 28 million chance it belonged to another African-American male.

A few days after her SART exam, A.W. sat for an RCAT forensic interview.[4] She told the social worker that Guernon had molested her three times, all in the garage and all while she was four. A.W. identified her "privates" as her "cookie box" for urination and "butt" for "boo booing." She indicated her cousin "Robbie" had "sticked my private area" with his finger, which "hurted bad." When this happened, she was standing naked while Robbie knelt with his pants down. "He put his pants back up" after he "hurt [her] in the private area." The molestation always happened in the garage where "there's like a tent but it's Robbie's room." A.W. recalled telling T.B. about the touching and that T.B. said the same thing had happened to her. A.W. felt "sad" talking about the incident. She was "really mad" at Robbie and said she liked "nothing about [him]" but could not elaborate why.

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4 Riverside Child Assessment Team.

Offering shifting accounts to detectives, Guernon denied molesting A.W. He first suggested he had simply told A.W. verbally to leave his room. Then he claimed he spanked her a month before, injuring her privates. When told the injuries were more recent, Guernon said he had grabbed A.W.'s wrists to make her leave. He later surmised A.W. might have run into a stick. When asked why A.W. mentioned touching, he offered that he "probably did whoop her" either once over her clothing or multiple times on her bare bottom.

After charges were filed, another first cousin of Guernon's came forward. K.W. stated that in 1997, Guernon took her to the bedroom of their grandmother's home in Los Angeles, got on top of her, pulled down his pants, placed her hand on his penis, and made her masturbate him. K.W. was around four, and there was a 15-year age gap between them. Guernon stopped when someone came home.

An amended information filed in January 2017 charged Guernon with three counts of sexual penetration of A.W., a person under the age of 10 (§ 289.7, subd. (b), counts 1, 2, and 3), one count of lewd and lascivious acts against a person under the age of 14 as to A.W. (§ 288, subd. (a), count 4), that same charge as to K.W. (§ 288, subd. (a), count 5), and one count of possessing child pornography (§ 311.11, subd. (a), count 6). A multiple victim enhancement was alleged as to counts 4 and 5. (§ 667.61, subd. (e)(4).)

At trial, the prosecution examined the grandmother, T.B., K.W., A.W., and the stranger who recovered the cell phone. Other witnesses testified about the physical evidence and other aspects of the investigation. During her testimony, A.W. identified herself in the forensic video but could not identify Guernon in the courtroom or define a

"cookie box." She denied Guernon had ever pulled down her pants, spanked her, or touched her private parts. Guernon testified in his defense and denied the allegations wholesale. He testified that he spanked A.W.'s bare bottom with his hand in May 2015; the cell phone with child pornography was not his; and that he had gathered ads of children in their underwear for a craft project to teach his granddaughter about "stages of life".

On January 31, 2017, the jury found Guernon guilty as charged on all counts and returned true findings on the multiple victim enhancements. The court sentenced him to the upper term of three years on count 6 and a consecutive indeterminate term of 30 years to life on the remaining counts.[5]

DISCUSSION

Guernon raises three discrete challenges on appeal, but each lacks merit. The court did not abuse its discretion in finding good cause to discharge a trial juror and replace her with an alternate. Admission of A.W.'s forensic video did not violate his Sixth Amendment right to confrontation despite her lack of recall and vague testimony. Finally, to the extent there was prosecutorial error under *Centeno, supra*, 60 Cal.4th 659, defense counsel's failure to object to that error was not prejudicial and does not support a claim for ineffective assistance.

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5 Specifically, the court designated count 6 as the principal count and imposed indeterminate terms of 15 years-to-life on counts 1 through 5, with counts 1 and 5 consecutive to the three-year term, counts 2 and 3 running concurrently and count 4 stayed pursuant to section 654.

1. *Discharge of Juror 1*

On the second day of trial, Juror 1 informed the court that she had been in an accident and "requested not to come in today." The prosecutor stated she appeared to be a good juror but requested substitution to avoid delaying trial. The SART nurse, a key witness, was scheduled for that day and was unavailable on Tuesday and Wednesday. A delay would also inconvenience the 92-year-old grandmother, also a key witness; she had traveled far, required a driver, and was not mobile. Defense counsel objected to the discharge, noting Juror 1 was the only African-American juror on the panel and that Guernon had the right to be tried before a representative cross-section of the community. He suggested the SART nurse testify on Thursday. In response, the prosecutor stated he "certainly" had no objection to delaying until Thursday, but doing so might prevent finishing within the one-week time estimate given.

The court explained that if it were a longer trial or if jurors had been time-qualified through the middle or end of the following week, he might have accommodated a delay. However, based on the one-week time estimate given, the court believed there was good cause to discharge Juror 1 and substitute in Alternate Juror 1. The court acknowledged that the discharged juror was "the only African-American" on the panel.

Guernon argues that discharging Juror 1 constituted reversible error. He claims the court failed to conduct an adequate inquiry to determine whether discharging Juror 1 was necessary. He further claims that there was no good cause to justify the discharge. We disagree.

"If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.' " (§ 1089.) " 'Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty "to make whatever inquiry is reasonably necessary" to determine whether the juror should be discharged.' " (*People v. Leonard* (2007) 40 Cal.4th 1370, 1409 (*Leonard*).) We review both the scope of any investigation and the ultimate decision to discharge a juror for abuse of discretion. (*Ibid.*; *People v. Duff* (2014) 58 Cal.4th 527, 560 (*Duff*).) " 'The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review.' " (*People v. Dekraai* (2016) 5 Cal.App.5th 1110, 1140.) In particular, " 'findings of fact are reviewed for substantial evidence.' " (*Ibid.*)

In the context of juror discharge, we apply a " 'heightened standard [that] more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury' [citations]. Specifically, the juror's 'inability to perform' his or her duty 'must appear in the record as a demonstrable reality.' " (*People v. Armstrong* (2016) 1 Cal.5th 432, 450 (*Armstrong*).) Our task goes beyond " 'simply determining whether any substantial evidence in the record supports the trial court's decision.' " (*Ibid.*) We " 'must be confident that the trial court's conclusion is manifestly supported by evidence on which the court *actually* relied.' " (*Id.* at p. 451,

italics added.) Nevertheless, provided the record discloses the actual basis for the trial court's decision, "we ask only whether the evidence relied upon was sufficient to support that basis as grounds for dismissal; we do not independently reweigh the evidence or demand more compelling proof than that which could satisfy a reasonable jurist." (*Duff, supra,* 58 Cal.4th at p. 560.)

For example, there was no error in discharging a juror a month into trial whose father-in-law was killed in a car accident. (*Leonard, supra*, 40 Cal.4th at p. 1409.) The court conducted an adequate investigation based on a voicemail message left by the juror and a phone call between the clerk and the juror's wife indicating the juror would be unavailable for the rest of the week to attend an out-of-town funeral, and the facts showed good cause for his discharge. (*Ibid*.) In *Duff,* there was no error in removing two jurors who fell sick, one during the guilt phase and another during the penalty phase. The court was not required to "elicit conclusive proof of the length of future incapacitation" or find a juror's "incapacitation [will] exceed some preset length." (*Duff, supra,* 58 Cal.4th at p. 560.)

Even more on point is *People v. Bell* (1998) 61 Cal.App.4th 282 (*Bell*), not cited by the parties. In that case, a defendant challenged the discharge of the only African-American male juror on the second day of trial. The juror had called the court and told the clerk his son had a medical emergency but was vague about what it was. (*Id.* at p. 287.) He needed to determine preliminary steps to get his son seen by a doctor and believed he could be back that afternoon but not sooner. (*Ibid.*) The court discharged the juror because it was unclear when he could return, and the court did not want to keep the

other jurors, alternates, and witnesses waiting. (*Id.* at p. 288.) We affirmed, concluding the court had made reasonable inquiry based on phone contact with the juror and its conference with the parties, and finding that good cause supported the discharge. (*Id.* at pp. 288−289.) We further rejected any constitutional claim under *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79:

> "Under both the Sixth Amendment to the United States Constitution and article I, section 16 of the California Constitution, a criminal defendant has a right to a fair and impartial jury 'drawn from "a representative cross-section of the community." ' (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 266, fn. omitted.) However, the defendant is not entitled to have a jury with the racial composition of his choice. (*People v. Williams* (1997) 16 Cal.4th 635, 663.) Excluding venirepersons from being on a jury, or discharging a sitting juror, on the sole basis of race would contravene these constitutional guarantees. However, discharging a Black person from jury service upon a finding of good cause, due to a family illness or injury, plainly does not." (*Bell*, at p. 289.)

Bell has twice been cited with approval by the California Supreme Court, and we follow its approach. (*Duff*, *supra*, 58 Cal.4th at p. 561; *People v. Smith* (2005) 35 Cal.4th 334, 349.) In *Bell*, a juror requested the morning off on the second day of trial to deal with his son's unspecified medical emergency. Here, Juror 1 asked for that day off to deal with her car accident. The circumstances of the medical emergency in *Bell* were vague and unascertained; the only detail about the car accident in this case was defense counsel's description that it was "a little bit of a fender-bender." Phone contact with the juror and a conference with the parties amounted to an adequate investigation in *Bell*; the same procedure was followed here. Good cause was found to discharge the juror in *Bell* to avoid delay and keeping witnesses and other jurors waiting. The same follows here.

We reject Guernon's various factual claims. He complains that the trial court did not investigate whether Juror 1 could come in that afternoon or the next morning; did not inquire whether the SART nurse could testify Thursday; and overlooked the prosecutor's lack of objection to delaying until Thursday. Even if these facts were true, discharge would not be erroneous under *Bell*. The testimony of the grandmother and the SART nurse took over two hours, and medical appointments for the trial judge necessitated two late starts that week. Concerned about extending trial beyond one-week time estimate, the judge reasonably found good cause to replace Juror 1 with an alternate at that early stage of proceedings. Any other approach would inconvenience an elderly witness and other jurors, require rescheduling an essential witness, and risk extending trial beyond the stated estimate.[6]

A defendant "cannot reasonably expect the court system to be placed in 'park' in the hope that an ostensibly favorable juror will return at some future time." (*Bell*, *supra*, 61 Cal.App.4th at p. 289.) The court was not required to "elicit conclusive proof" that Juror 1 could not serve; her request not to come in that day because of a car accident sufficed. (*Duff*, *supra*, 58 Cal.4th at pp. 560−561.) Moreover, whether a juror's incapacitation "can best be accommodated by a continuance or replacement with an alternate is a matter committed to the trial court's discretion," and "in the right circumstances, an absence of a day or less may warrant excusal." (*Ibid*.)

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6 Although trial did ultimately extend into the following week, "[w]e review the trial court's exercise of discretion in light of the record before it when it ruled." (*People v. Elliot* (2012) 53 Cal.4th 535, 552.)

Guernon compares this case to *People v. Delamora* (1996) 48 Cal.App.4th 1850. There, the trial court dismissed two jurors *during deliberations* because they said they had reached the maximum number of days their employers would pay them for jury service. (*Id.* at pp. 1854−1855.) They were not ill, had not asked to be excused, and had not indicated they were unwilling or unable to continue if they had to serve another day without pay. (*Id.* at p. 1855.) The court's discharge without any inquiry was an abuse of discretion; prejudice was apparent by the fact that the previously divided jury immediately reached a verdict post-substitution. (*Ibid.*) A similar result was reached in *People v. Young* (2017) 17 Cal.App.5th 451. In *Young*, the trial court removed a juror for being 15 minutes late at the start of the evidence portion of the trial. The court made no inquiry as to the reason for his delay but surmised he could have been stuck in traffic. (*Id.* at p. 464.) Unlike these authorities, the court's inquiry established the reason for the juror's absence, and "[n]o further inquiry was required." (*Leonard*, *supra*, 40 Cal.4th at p. 1410.) Moreover, Juror 1 was discharged early in the evidentiary portion of trial and well before deliberations began.

We likewise reject Guernon's assorted constitutional arguments. He cites *Batson/Wheeler* and claims dismissal of the only African-American from the jury resulted in an unrepresentative panel.[7] *Bell* persuasively rejects that claim. (*Bell*, *supra*, 61 Cal.App.4th at p. 289.) We likewise disagree that the discharge implicated Guernon's Fifth or Sixth Amendment rights. "Alternates are selected from the same source, in the

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7 At the hearing, the prosecutor stated "Mr. Guernon is either Caucasian or Hispanic," and victim Jane Doe A.W. "is African-American."

same manner, with the same qualifications and are subject to the same challenges. Alternates have an equal opportunity to observe the entire proceedings and take the same oath as the regular jurors." (*People v. Dell* (1991) 232 Cal.App.3d 248, 256.) Timing also matters: the substitution of an alternate before deliberations "does not offend constitutional proscriptions"; "the 12 qualified jurors have not only heard and observed all the proceedings from equivalent vantage points, but in addition each has fully participated in the deliberations." (*People v. Collins* (1976) 17 Cal.3d 687, 691, 694.) Guernon was not denied his Sixth Amendment right to a jury trial "by the substitution of [an] alternate[] [he] had previously screened and approved." (*Dell*, at p. 257 [no error in discharging juror injured in a car accident].) The substitution also did not offend double jeopardy, as Guernon also contends. "[A]n alternate juror, even if improperly seated, is part of the same jury chosen by the defendant"; therefore "double jeopardy is inapplicable." (*People v. Hernandez* (2003) 30 Cal.4th 1, 9; citing *People v. Burns* (1948) 84 Cal.App.2d 18, 32 ["[i]f the substitution of the alternate for one of the regular jurors is in accordance with . . . section 1089 no question of double jeopardy would arise"].)

In short, the evidence elicited from Juror 1's phone call could satisfy "a reasonable jurist" at that early stage of proceedings that judicial economy supported discharge over delay. (*Duff, supra*, 58 Cal.4th at p. 560.) There was no error in excusing Juror 1.

2. *Confrontation Clause*

Guernon argues the trial court violated his Sixth Amendment right to confrontation by admitting Jane Doe A.W.'s statements to the forensic interviewer. He argues these statements involve inadmissible testimonial hearsay because A.W.'s vague and unresponsive testimony at trial, two years after the forensic interview, rendered her unavailable for meaningful cross-examination.

The People argue that Guernon forfeited this claim by failing to assert a specific objection before the trial court. Citing *People v. Loy* (2011) 52 Cal.4th 46 at page 66, Guernon counters that his general objection to the reliability of the forensic video preserved his constitutional claim. Assuming the argument was preserved, we conclude it fails on the merits.

Evidence Code section 1360 creates a hearsay exception for statements by a child victim of sexual abuse. Such out-of-court statements are admissible if the trial court finds "in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability." (Evid. Code, § 1360, subd. (a)(2).) This reliability requirement "does not dispense with the Confrontation Clause." (*Bullcoming v. New Mexico* (2011) 564 U.S. 647, 661.) Under *Crawford v. Washington* (2004) 541 U.S. 36, 59 "the prosecution may not rely on 'testimonial' out-of-court statements unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination." (*People v. Lopez* (2012) 55 Cal.4th 569, 576.) Generally, "admitting a witness's testimonial hearsay statement does not violate the Sixth Amendment where, as here, the witness appears at trial and is

subject to cross-examination about the statement." (*People v. Cowan* (2010) 50 Cal.4th 401, 468 (*Cowan*), citing *Crawford*, at pp. 59, fn. 9, 60.)

Guernon contends that although she was called at trial as a witness, A.W.'s testimony on the stand was so vague and unresponsive that she was not subject to meaningful cross-examination so as to permit admission of her forensic interview. He complains that she claimed to have no memory of the forensic interview or the SART exam, and never testified that she was touched inappropriately. Unfortunately for Guernon, a similar argument was addressed and squarely rejected in *United States v. Owens* (1988) 484 U.S. 554, 558 (*Owens*).

In *Owens*, *supra*, 484 U.S. 554, a witness gave a statement to police implicating the defendant as his assailant. He remembered identifying the defendant to police, but conceded he did not recall seeing his assailant or remember if his visitors during his hospital stay had implicated the defendant. Finding no confrontation clause violation, the court explained:

> " '[T]he Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." ' " "[Citations.] . . . [T]hat opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination [citation]) the very fact that he has a bad memory. . . . The weapons available to impugn the witness'[s] statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." (*Id.* at pp. 559−560.)

Owens rejects the notion "that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness' live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect." (484 U.S. at pp. 559–560.) This rule compels us to reject Guernon's *Crawford* error claim. (See *Cowan*, *supra*, 50 Cal.4th at p. 468 ["[n]othing in *Crawford* casts doubt on the continuing vitality of *Owens*"].)

Guernon essentially tries to resurrect our decision in *People v. Simmons* (1981) 123 Cal.App.3d 677, which concluded that an accused must have the ability to "*meaningfully* confront and cross-examine the witness at trial." (*Id.* at p. 681, italics added.) But as our Supreme Court has recognized, *Simmons* was abrogated by *Owens*. (*Cowan*, *supra*, 50 Cal.4th at p. 468; see *People v. Gunder* (2007) 151 Cal.App.4th 412, 419, fn. 7 ["*Simmons* is not of any precedential value as it predates the controlling case of *United States v. Owens*"].) Following *Owens*, " 'when a hearsay declarant is present at trial and subject to unrestricted cross-examination,' 'the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness'[s] demeanor satisfy the constitutional requirements,' notwithstanding the witness's claimed memory loss about the facts related in the hearsay statement." (*Cowan*, at p. 468; see *People v. Rodriguez* (2014) 58 Cal.4th 587, 632 [citing *Owens* to conclude witnesses "claim of total lack of recall . . . does not implicate the confrontation clause"]; *People v. Perez* (2000) 82 Cal.App.4th 760, 762 ["a criminal defendant is not denied the constitutional right to confront a witness when the witness is present at trial and subjected to unrestricted cross-examination but answers 'I don't remember' to virtually all questions"].) Because A.W.

was present at trial and subject to unrestricted cross examination, we reject Guernon's confrontation clause claim.[8]

3. *Ineffective Assistance of Counsel as to Alleged* Centeno *Error*

Finally, Guernon argues that his convictions must be reversed because of prosecutorial error under *Centeno, supra*, 60 Cal.4th 659. He claims that the prosecutor's statements during closing arguments implied that the jury could convict him if the evidence reasonably suggested his guilt. Because there was no objection by defense counsel, Guernon's contention is forfeited. (*Id.* at p. 674.) He therefore argues that his counsel's failure to object constituted ineffective assistance. (See *Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) As we explain, even if counsel's performance was deficient, this is not the "very close case" presented in *Centeno*. (*Centeno*, at p. 677.) Finding no prejudice, we reject Guernon's ineffective assistance claim. (*Strickland*, at p. 694; see *Ledesma*, at pp. 217−218.)

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8 *People v. Murillo* (2014) 231 Cal.App.4th 448, upon which Guernon relies, is inapposite. In that case, a victim identified the defendant as the shooter in a lineup but refused to testify at trial. Over defense objection, the trial court permitted the prosecutor to ask the victim over 100 leading questions based on his earlier statements to detectives. (*Id.* at pp. 450–451.) The witness's refusal to answer these leading questions while the prosecutor read from his police interviews deprived the defendant "the opportunity to cross-examine the victim on what was tantamount to devastating adverse testimony." (*Id.* at p. 456.) Here, the prosecutor did not elicit A.W.'s out-of-court statements through leading questions. Unlike the witness in *Murillo*, A.W. answered all questions asked from both parties. Defense counsel's vigorous cross-examination indeed elicited testimony helpful to his case, casting doubt on the ultimate issue of whether Guernon sexually abused A.W.

Although "[a]dvocates are given significant leeway" during closing argument, it is misconduct to misstate the law or attempt to lessen the prosecution's burden of proof beyond a reasonable doubt. (*Centeno*, *supra*, 60 Cal.4th at p. 666.) A prosecutor may not imply during closing arguments that "the People's burden was met if its theory was 'reasonable' in light of the facts supporting it." (*Id.* at p. 671.) It is proper to direct jurors on "reasonably possible interpretations to be drawn from the evidence" but not to imply "that so long as [the prosecutor's] interpretation of the evidence was reasonable, the People had met their burden." (*Id.* at p. 672.) *Centeno* was a "very close case" (*id.* at p. 677) involving molestation charges as to a minor. There was no physical evidence corroborating the alleged lewd acts; the minor denied the event occurred at trial; and the minor's father corroborated the defendant's account that nothing had occurred. (*Id.* at p. 670.) On that record, defense counsel's failure to object to the prosecutor's erroneous argument amounted to constitutionally ineffective assistance.

The People claim the prosecutor here did no more than what *Centeno* allowed, discussing reasonable and unreasonable interpretations of the circumstantial evidence presented to decide whose cell phone it was and the cause of A.W.'s injury. (See *People v. Romero* (2008) 44 Cal.4th 386, 416 [no error in telling jurors to draw reasonable inferences].) Guernon disagrees, pointing to statements in the argument that "the *result* has to be reasonable" and that the only "reasonable conclusion" was that Guernon had "digitally penetrated his four-year-old cousin, forced [K.W.] to masturbate him, and took sexually explicit genital photos of four-year-old [A.W.]." (Italics added in first quote.)

The prosecutor's statements in some ways mirrored those deemed improper in *Centeno*. Statements urging the jury to reach a *reasonable* result may, standing alone, have "diluted the People's burden." (*Centeno, supra*, 60 Cal.4th at p. 673; see *id.* at p. 672 ["it is error for the prosecutor to suggest that a 'reasonable' account of the evidence *satisfies the prosecutor's burden of proof*"].) But each time the prosecutor here made that type of remark, he followed it by stating the *only* reasonable conclusion to draw from the circumstantial evidence was guilt. For instance, after stating the "result ha[d] to be reasonable," he added "[t]here [wa]s *only one* reasonable conclusion," and that was guilt. (Italics added.) He later urged jurors to "look at all of the evidence in its totality" and "do what is reasonable." But he immediately clarified that "the *only* reasonable conclusion . . . in this trial is that the defendant . . . was and is a child molester." (Italics added.) The same point was made during rebuttal: "When you look at the totality of the evidence, there is *only one* reasonable conclusion which we can reach when given the options . . . , and that is the defendant is guilty of molesting [K.W.], guilty of molesting [T.B.], even though it's not charged in this case, and digitally penetrating and molesting [A.W.]."

The prosecutor's repeated clarification that the *only* reasonable conclusion from the evidence was to find guilt distinguishes this case from *Centeno*. Rather than telling jurors to find Guernon guilty based on *a* "reasonable" interpretation of the evidence, the prosecutor was telling jurors to do so based on *the only* reasonable interpretation of the evidence. As *Centeno* explains, the former is improper because "even if the jury rejects the defense evidence as unreasonable or unbelievable, that conclusion does not relieve or mitigate the prosecutorial burden." (*Centeno, supra,* 60 Cal.4th at p. 673.) The latter, in

effect, argues that the jury should have no reasonable doubt because there is only one reasonable conclusion—and that is that the defendant is guilty.

And even were we to assume that *Centeno* error occurred, reversal is unwarranted. "A prosecutor's misstatements of law are generally curable by an admonition from the court." (*Centeno*, *supra*, 60 Cal.4th at p. 674.) Here, as in *Centeno*, the issue was forfeited by defense counsel's failure to object and must be raised through a claim of ineffective assistance of counsel. (*Ibid.*) To make such a claim, Guernon "bears the burden of showing by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*Ibid.*; *Strickland*, *supra*, 466 U.S. at pp. 688, 694; *Ledesma*, *supra*, 43 Cal.3d at pp. 216–217.) Moreover, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland*, at pp. 693−694; *Ledesma*, at pp. 217−218.)

Here, even if defense counsel's failure to object was objectively deficient (see *Centeno*, *supra*, 60 Cal.4th at p. 676), it was not prejudicial. This is far from the "very close case" presented in *Centeno*. (*Id.* at p. 677.) Guernon's DNA was on A.W.'s underpants and vulva, and the SART exam showed an injury consistent with digital penetration. A.W. told the forensic examiner in age appropriate language that Guernon had digitally penetrated her; she made similar statements to the SART nurse and to T.B.

There were pictures of prepubescent female genitalia on a cell phone given to Guernon. Accounts of K.W. and T.B. bolstered A.W.'s account and supported his lewd acts charge as to K.W. Moreover, the jury was told that it could infer consciousness of guilt from Guernon's attempt to flee: when T.B. confronted him after the May incident, Guernon said nothing and took off to a park. (CALCRIM No. 372.) Although Guernon denied the molestation allegations at trial, he offered shifting accounts to law enforcement, likely impacting his credibility. Based on this evidence, there is no reasonable probability a defense objection to alleged *Centeno* error would have changed the outcome on count 1 (digital penetration of A.W. in May 2015), count 4 (lewd acts against A.W.), count 5 (lewd acts against K.W.), or count 6 (possession of child pornography).

Counts 2 and 3, alleging digital penetration of A.W. on two previous occasions, arguably present a closer call given the lack of physical evidence or unequivocal victim testimony. Nevertheless, we reach the same conclusion. During her forensic interview, A.W. asserted that Guernon digitally penetrated her on three separate instances while she was four. "Nothing different happened" during the other two instances; they all took place in A.W.'s great-grandmother's garage, and she was "still four three times in a row." A.W.'s birthday is October 18; Guernon moved into the garage in December 2014; and his grandmother gave him a cell phone roughly around the time he moved in. Corroborating A.W.'s statement of multiple incidents of penetration was a photo on Guernon's cell phone taken on November 27, 2014. The photo showed A.W. nude in a bathtub with her legs spread and genitalia visible. T.B. testified that Guernon had taken nude pictures of *her* when he had molested her as a child. Together, the photographic

evidence on Guernon's cell phone strongly supports his conviction on one of the two remaining digital penetration counts. It also corroborates A.W.'s prior statements of three penetrations to support the other.

In short, although A.W. denied any touching or penetration at trial, there was no prejudice as to any conviction from defense counsel's failure to object to any *Centeno* error by the prosecutor. *Centeno* emphasized "the closeness of the case" in finding ineffective assistance. (60 Cal.4th at p. 677.) On a very different record here, we reject Guernon's assertion there is a reasonable probability that any ineffective assistance of counsel in failing to object to the prosecutor's argument had any effect on the verdict.

DISPOSITION

The judgment is affirmed.

DATO, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.